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Supreme Court of the United States

October Term, 1940.

No. 567.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Petitioner,

vs.

JAMES FYFE and JOHN T. BAILEY, Doing Business as United Fibre Company,
Respondents.

PETITIONER'S REPLY BRIEF.

Russell C. Gay and
Sherwood E. Silliman,
Attorneys for Petitioner.

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PETITIONER'S REPLY BRIEF.

Respondents have given no convincing reason why this Court should not take certiorari in this case:

1. Respondents have failed to show why the rule of this Court, as laid down in *Oregon-Washington Co.* v. *McGinn,* 258 U. S. 409, is not applicable to this case, and have completely overlooked the conflict between the decision rendered in this case and the rule of the Fifth Circuit Court of Appeals in *Inland Waterways Corp.* v. *Standard Commercial Tobacco Co.,* 65 F. (2d) 715.

2. Respondents have cited no decisions of this Court sustaining the Circuit Court of Appeals in declaring illegal and void the three provisions of the bills of lading set forth on pp. 2-3 of the petition, which even the Circuit

Court of Appeals admits that, if they are valid, petitioner would be relieved of liability.

3. Respondents give no valid reason why this Court should not take certiorari to interpret the national policy regarding shipowners' liability for fires arising in the course of maritime commerce as expressed in the Fire Statute, 46 U. S. C. A. 182, now in a state of confusion due to the conflict between the decision in this case and *The Munaires*, 12 F. Supp. 913.

A reading of respondents' brief shows that they have evaded the grounds of our application.

They rely on the conclusion of law that Manhattan Lighterage Company was the agent of the petitioner, basing this statement on the conclusion of the Circuit Court of Appeals below that Manhattan Lighterage Company was the agent of petitioner. The fallacy of that argument is shown in our Third Point (Petitioner's Brief, p. 17) and the respondents' admission now for the first time that Manhattan Lighterage Company was their own agent. At page 3 of their brief respondents say:

> "The through bills of lading issued by Wilhelmsen covering the cargo in this case, provided for transshipment at New York (Exs. 8, 9, R., pp. 9, 11, offered, R., p. 49) and set out that Wilhelmsen should be considered the shipper's agent to arrange for on-carriage (R., p. 19, offered, R., p. 49)."

Taking this interpretation of the bills of lading as correct, then the Manhattan Lighterage Company was respondents' (shippers') agent since Wilhelmsen selected Manhattan. Wilhelmsen instructed petitioner, Pan-Atlantic Steamship Corporation, "to lodge orders with the Manhattan Lighterage Corp., covering transfer of the

above mentioned cargo as soon as same is available" (R., 86, Ex. 1, R., 44). Respondent cannot be heard to complain of the negligence of the Lighterage Company that its own agent Wilhelmsen selected.

Reply to respondents' Point I, pages 4-7, reading: "Petitioner is liable for the negligent destruction of respondents' cargo".

Missouri-Pacific R. R. Co. v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366 is not in point. There, the Railroad Company was named in the bill of lading as the terminal carrier and engaged the St. Louis-San Francisco Railroad for a mere switching operation into the consignee's warehouse. In the case at bar, Pan-Atlantic was not named in the bill of lading and its liability only began when the merchandise was received into its custody. (See bill of lading, paragraph 11[g] set forth in the petition, page 2.) In the case at bar the Circuit Court of Appeals had to declare this paragraph illegal in order to hold petitioner liable because it had not received the merchandise into its custody at the time of the loss. In the *Missouri-Pacific R. R. Co.* case, this Court *sustained* the bill of lading and held that under it the Missouri-Pacific R. R. Co. was liable.

Morris, et al. v. *Lamport & Holt, Ltd.*, 54 F. (2d) 925, 57 Fed. (2d) 1081, is not in point. There also the steamship company was the carrier named in the bill who agreed, as is stated by the Court in the opening paragraph of its opinion, page 925: "to carry the skins on the steamer *Swinburne* from Ceara a port in northern Brazil to New York. The skins were damaged by water while on the lighter in transit from the shore at Ceara to the *Swinburne*." So the damage was done during the loading, after the skins had passed into the custody of the carrier

named in the bill of lading. This was expressly pointed out by the Court. (See unitalicized second sentence in the quotation in respondents' brief, page 6.)

Reply to respondents' Point II, pages 7-9, reading: "Petitioner is not entitled to the benefit of the Fire Statute (R. S. 4282; 46 U. S. C. 182".

Respondents' Point II only emphasizes the inconsistent positions taken by the Court below in holding on the one hand that the Lighterage Company was the agent of the petitioner and that "the lighter is but a substitute for the ship" (R. 149), and on the other hand, concluding that where the Lighterage Company was exonerated under the Fire Statute, the petitioner can be held liable.

In *Earle & Stoddart* v. *Ellerman-Wilson Line,* 287 U. S. 420, cited by petitioner in its brief, page 15, Mr. Justice Brandeis had occasion to review the Federal decisions interpreting the Fire Statute, where immunity from liability for damage by fire was held to be lost. In a footnote on page 428 of the decision, he says:

> "In all the cases where immunity from liability for damage by fire was held to be lost because of neglect of the owners, the courts have based their finding of neglect on the action of the owners or managing agents, or upon their failure to see that action was taken where it was their duty to act.",

citing a long line of Federal decisions. Certainly there was no failure to act on the part of the petitioner with respect to the fire and resulting damage to respondents' merchandise, because petitioner had nothing to do with the fire or operation and management of the lighter.

Petitioner's brief cites the case of *The Munaires,* 12 F. Supp. 913, where the court followed *Earle & Stoddart*

v. *Ellerman's Wilson Line, supra,* and *liberally* construed the Fire Statute to relieve the shipowner from responsibility for a fire arising on a wharf that it had leased and was using exclusively. Respondents in their brief take the position that the liberal construction of the Fire Statute in *The Munaires* case was "purely obiter." We cannot agree with respondents. The case has been widely followed by the shipping industry and its insurers and it is enough again to point out that the Circuit Court of Appeals expressly disagreed with this case, saying, "Insofar as *The Munaires* may be interpreted to express views otherwise, we cannot agree" (R. 153).

In the last paragraph of respondents' Point II, page 9, they agree that unless paragraph 4 of the bills of lading (copied in petition, pp. 2-3) is made invalid by Sec. 1 of the Harter Act, petitioner is relieved from responsibility. No court, except the Court below, has held that a shipper may not extend the Fire Statute by contract. In *Earle & Stoddart* v. *Ellerman's Wilson Line,* 287 U. S. 420, 428, this Court pointed out that there were 238 bills of lading on 18 different forms involved in the case, saying that many of the bills of lading contain a provision reading as follows:

> "It is mutually agreed that * * * the carrier shall not be liable, as carrier or otherwise, for any loss, damage, delay or default, whether occurring during transit or *before,* * * * occasioned by *fire* or flood, *from any cause or wheresoever occurring* * * * ." (Italics added.)

The above quoted provision is similar to paragraph 4 of the bills of lading declared illegal by the Circuit Court of Appeals in this case. The shipping industry and its insurers are entitled to have the Supreme Court pass on the important and vital question of whether or not they

may continue to contract with respect to the Fire Statute as they have heretofore. In *The Munaires, supra,* it was held they could extend the Fire Statute by contract.

A writ of certiorari should be granted in order that this Court may review the decision of the United States Circuit Court of Appeals for the Second Circuit, for the reasons set forth in our petition and brief.

Respectfully submitted,

Russell C. Gay and
Sherwood E. Silliman,
70 Pine Street,
New York, New York.